

STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
GIBSON GROUP, LLC)	
d/b/a MOROCCO SPORT & HARDWARE)	PERMIT NO. DL56-23292
3925 SOUTH US HIGHWAY 41)	
MOROCCO, INDIANA 47963)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Gibson Group, LLC, d/b/a Morocco Sport & Hardware, 3925 South US Highway 41, Morocco Indiana 47963 ("Applicant") is the applicant for a Type 116 Indiana Alcohol and Tobacco Commission("Commission" or "ATC") permit number DL56-23292. On or about March 15, 2005, Applicant filed its application, which was assigned to the Newton County Local Alcoholic Beverage Board for hearing ("LB Hearing"). The Local Board heard the application request on November 13, 2007, and on that same day, voted 2-1 to approve the application. On December 4, 2007, the Commission voted to reverse the Local Board's determination and deny the application. The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge U-Jung Choe. The matter was set for hearing on September 4, 2008, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Applicant was represented by Attorney Patrick K. Ryan. There were no remonstrators of record before the Hearing Judge in this matter.

The Hearing Judge, having reviewed the tape- recorded transcript of the LB Hearing, the evidence submitted to the Commission during the ATC Hearing ("ATC Hearing"), contents of the entire Commission File ("ATC File"), and the evidence submitted subsequent to the ATC Hearing, now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

Natalie Gibson.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

None.

C. The following individuals testified before the Local Board against the Applicant in this cause:

None.

D. The following evidence was introduced and admitted before the Local Board against the Applicant:

None.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Natalie Gibson. Miss Gibson testified that she is joint owner and full-time manager for the Applicant, with full responsibilities over Morocco Sport and Hardware. Miss Gibson testified that she had opened this store to replace a previously existing business in Morocco, Indiana formerly known as “James’s Sporting Goods Store.” Although this store had recently closed approximately two years ago, it had been awarded an alcohol permit by the Commission during its many years of operation. Miss Gibson further testified that the nature of her business had evolved to that of a convenience store in order to stay in business at its present location. Miss Gibson testified that her store must engage in the primary retail sale of groceries in order to financially operate in Morocco, Indiana. Miss Gibson testified that the original name denoting it as a “Sport and Hardware” store had become a misnomer. Miss Gibson testified that a number of local businesses very similar to her store currently maintain alcoholic beverage permits in Newton County.

Miss Gibson further testified that at the LB Hearing, Officer Traughber of the Indiana State Excise Police concluded that her business was comparable to a “Menards” or “Home Depot,” when in actuality this comparison is inaccurate, and her business is best compared to a “Casey’s General Store.”

Miss Gibson further testified that several local stores in Newton County including, but not limited to, at least two “Casey’s General Stores,” were awarded an alcoholic beverage permit. Mr. Gibson further testified that her business was similar in size, if not somewhat larger, and sold grocery items nearly identical to the other “Casey’s General Stores” presently maintaining alcoholic beverage permits. Miss Gibson testified that these stores, including her own, sold typical grocery items including milk, chips, snacks, bread, hot sandwiches, coffee, pet food, and other items typically sold by grocery stores. Miss Gibson further testified that she did not believe that any aspect of her store would

make it any less likely to be a grocery store than the other numerous convenience stores that maintain alcohol permits in Newton County and throughout the State of Indiana.

Miss Gibson next testified as to the security and training undertaken by the Applicant's store. Mr. Gibson stated that the following security and training mechanisms were to be implemented at this store: (1) We Card Training; (2) cash register safeguards that require a cashier to enter the date of birth of any individual purchasing beer and/or wine; and (3) a security camera, which monitors and record inventory and the actions and transactions of customers and cashiers.

Miss Gibson stated that the security camera recordings can be reviewed daily by the Applicant's store management to ensure that all personnel adhere to the Applicant's training and procedural requirements. In addition, the store will require its employees to undergo alcohol awareness management for further education. Miss Gibson further testified that the business has only four (4) employees, with only one (1) under the age of twenty-one (21), and that employee is scheduled to work part-time on Sundays only. Applicant's employment policies provide for termination of employment for a violation of any alcoholic beverage laws or procedures.

At the conclusion of this hearing, the Applicant's Attorney further requested the Commission to review the ATC File to ensure full compliance with the Applicant's Public Records Request as submitted on April 21, 2008. At the ATC Hearing, the Hearing Judge's review of the ATC File revealed that the Applicant had not been provided with complete discovery, specifically, a Memorandum from Officer Traugher, dated November 19, 2007, and not previously revealed or provided to the Applicant.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Exhibit A – A group of photos illustrating the Applicant's business premises.

C. The following individuals testified before the Commission against the Applicant in this cause:

None.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

IV. FINDINGS OF FACT

1. Gibson Group, LLC, d/b/a Morocco Sport & Hardware, 3925 South US Highway 41, Morocco Indiana 47963 is an applicant for a Type 116 Alcohol and Tobacco Commission permit, #DL56-23292. (LB Hearing; ATC File)

2. The Applicant sells milk and other dairy products, soup, bread, eggs, coffee, candy, soft drinks, cereal, soda, snacks hot sandwiches and other items customarily found in a grocery store, as well as prepares and sells hot sandwiches and chili. (LB Hearing; ATC Hearing).

3. The Applicant must rely on the primary sale of groceries and operate as a convenience store in order to stay in business. (ATC Hearing).

4. The Applicant established by evidence at the LB Hearing and the ATC Hearing that it meets the Commission's "character of business test," Ind. Code § 7.1-3-1-19, and that it qualifies as a "grocery store" to hold a Type 116 alcoholic beverage permit. (ATC File; LB Hearing; ATC Hearing).

5. Several holders of Type 116 alcoholic beverage permits in Newton County operate businesses similar in nature to that of the Applicant, are located in close proximity to the Applicant, and are direct competitors of the Applicant. (ATC File; ATC Hearing).

6. The Commission has issued numerous other alcoholic beverage permits to stores similar, if not identical, to the Applicant's store in Newton County. (ATC File; ATC Hearing).

7. The Applicant has applied for the alcoholic beverage permit in order to compete with other outlets offering alcoholic beverages for sale in Newton County. (ATC Hearing).

8. There were no remonstrators nor was there any evidence submitted against Applicant's petition at the LB Hearing.. (LB Hearing)

9. The Local Board voted 2-1 to approve the Permit. (LB Hearing)

10. The Local Board indicated that the basis of the Local Board's recommendation was the fact that the Applicant's business was similar in nature to a number of other local businesses which have been granted identical permits. (LB Hearing).

11. The Commission has determined several other nearby convenience stores, each of which is substantially similar to that of the Applicant, to be "grocery stores" pursuant to Indiana law (ATC File; ATC Hearing).

12. The Applicant's employment training will include extensive training to avoid issues regarding the sale of alcoholic beverages to underage persons, to include the "We Card" Program and technical alcohol management training. (ATC Hearing).

13. The Applicant employs a number of security devices to secure the premises

and avoid the unauthorized sale of alcohol, including cameras, management review of security tapes, and will install cash registers that require a customer's age to be entered before alcohol may be purchased. (ATC Hearing).

14. Applicant's employment policies provide for termination of employment for a violation of any alcoholic beverage laws or procedures (ATC Hearing).

15. There are other businesses that sell alcoholic beverages in the immediate vicinity of Applicant's business, including, but not limited to a restaurant and bar, which is located literally across the street. (ATC File; ATC Hearing).

16. Applicant has introduced evidence of area residents' desire or approval of its ability to sell beer/wine (LB Hearing; ATC Hearing).

17. The Newton County Board of Zoning Appeals and Plan Commission have found Applicant's business to be in compliance with local zoning ordinances for a convenience store that sells alcohol. (ATC File).

18. Any finding of fact may be considered a conclusion of law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Indiana Code § 7.1-1-2-2 and § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the ATC File relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the ATC File. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. Applicant is a fit and proper applicant and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1.
8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).
9. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.
10. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
11. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
12. Where an Applicant shows that competing stores located in close proximity to the proposed permit premises are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*
13. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on in the premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19.
14. The Commission may issue a beer and wine permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19.
15. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. *See Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).
16. The term "grocery store," in common usage, means a building or structure in which groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438-442 (Ind. App. 1952).
17. The word "substantial" as used in Ind. Code § 7.1-3-1-19 means something more than a nominal amount, something more than seeming or imaginary, but does not mean 50% or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

18. The phrase “in the premises” as used in Ind. Code § 7.1-3-1-19 means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.

19. The Applicant has established that a substantial portion of its business in the premises is in the nature of a grocery store. (LB Hearing; ATC Hearing).

20. The Applicant has submitted substantial evidence that it, in fact, meets the character of business test for a grocery store and is qualified to hold an ATC permit. (LB Hearing; ATC Hearing).

21. The Applicant is a “grocery store” under Indiana law and is therefore qualified to hold a type 116 grocery permit. Ind. Code § 7.1-3-5-2. 11.

22. The Local Board heard testimony and reviewed petitions submitted by the Applicant regarding the community’s need or desire for the grant of a permit to the Applicant. Comments made by members of the Local Board immediately following their vote indicated they felt there was a need for alcohol to be served at the proposed permit premises. Under 905 IAC 1-27-4, the Local Board must consider community need and desire in reaching their decision. The Local Board considered the evidence before it and based its decision on that evidence. Therefore, the decision of the Local Board to approve the permit was based upon substantial evidence. (LB Hearing).

23. The Commission denied this application without sufficient evidence that would support a finding that this permit should not be issued. (LB Hearing; ATC Hearing).

24. The Commission’s decision to reverse the findings of the Local Board and deny the issuance of permit to the Applicant was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11(a); *Taylor Drug Stores, Inc. v. Indiana Alcoholic Beverage Comm’n*, 497 N.E.2d 932 (Ind. Ct. App. 1986).

25. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

26. To deny the Applicant’s permit while granting other similarly situated applicants’ permits would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

27. Although the rules of evidence are relaxed in hearings before an administrative agency such as the Commission, it does not follow that no rules of

evidence apply. *Oriental Health Spa v. Fort Wayne*, 526 N.E.2d 1019, 1022 (Ind. Ct. App. 1988). Officer Traughber's November 19, 2007 Memorandum and the statements therein suggesting that the Applicant is not a grocery store within the meaning of Indiana law is a legal conclusion and is therefore inadmissible under Rule 704(b) of the Indiana Rules of Evidence.

28. Officer Traughber's submission of additional evidence not revealed to the Applicant, as described in her Memorandum of November 17, 2007 is in violation of the Indiana Open Door Law as set forth in Indiana Code 5-14-1.5.

29. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, the decision of the Alcohol and Tobacco Commission denying the application of Gibson Group, LLC, d/b/a Morocco Sport & Hardware, 3925 South US Highway 41, Morocco Indiana 47963 for a Type 116 permit #DL56-23292, is reversed, the recommendation of the Local Board in this matter is reaffirmed, and this permit should be GRANTED.

DATED: September 26, 2008

U-Jung Choe, Hearing Judge